No. 16-1363

IN THE

Supreme Court of the United States

KIRSTJEN M. NIELSEN, SECRETARY OF HOMELAND SECURITY, *et al.*,

Petitioners,

v.

MONY PREAP, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR AMICI CURIAE CONSTITUTIONAL AND IMMIGRATION LAW PROFESSORS IN SUPPORT OF RESPONDENTS

MARK C. FLEMING
Counsel of Record
ANNALEIGH E. CURTIS, PH.D.
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. DUE PROCESS DOES NOT PERMIT MANDATORY DETENTION, WITHOUT ANY INDIVIDUALIZED DETERMINATION OF RISK OF FLIGHT OR DANGER, OF NONCITIZENS WHO HAVE LONG SINCE BEEN RELEASED FROM CRIMINAL CUSTODY 2

A. Due Process Requires An Individualized Determination Of Flight Risk Or Danger Before Locking Up A Person Who Is Otherwise At Liberty 2

B. The Government's Desire For An Irrebuttable Presumption Of Flight Risk Or Danger Is Improper Where The Individual Is At Liberty 7

C. Bond Hearings For Noncitizens Who Are Not Taken Into Immigration Custody Immediately Upon Release Do Not Compromise The Government's Ability To Enforce The Immigration Laws 11

TABLE OF CONTENTS—Continued

Page

II. IF, AS THE GOVERNMENT CONTENDS, THE STATUTE IS AMBIGUOUS, THE COURT SHOULD AVOID THE GOVERNMENT'S INTERPRETATION, WHICH RAISES SERIOUS CONSTITUTIONAL QUESTIONS 14

CONCLUSION 18

APPENDIX: List of Amici 1a

TABLE OF AUTHORITIES

CASES

Page(s)

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 16

Barker v. *Wingo*, 407 U.S. 514 (1972) 9

Bridges v. *Wixon*, 326 U.S. 135 (1945) 8

Castaneda v. *Souza*, 810 F.3d 15 (1st Cir. 2015) 14

Clark v. *Martinez*, 543 U.S. 371 (2005) 16, 17

Demore v. *Kim*, 538 U.S. 510 (2003) ..... *passim*

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568 (1988) 15

Foucha v. *Louisiana*, 504 U.S. 71 (1992) 3, 4

Hosh v. *Lucero*, 680 F.3d 375 (4th Cir. 2012) 14

In re Adeniji, 22 I&N Dec. 1102 (BIA 1999) 11

In re Guerra, 24 I&N Dec. 37 (BIA 2006) 11

In re Rojas, 23 I&N Dec. 117 (BIA 2001) 14

INS v. *St. Cyr*, 533 U.S. 289 (2001) 17

Jackson v. *Indiana*, 406 U.S. 715 (1972) 3

Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 3, 6, 15

Kansas v. *Hendricks*, 521 U.S. 346 (1997) 3, 4

Kim v. *Schiltgen*, 1999 WL 33944060 (N.D. Cal. Aug. 11, 1999) 5

Kwong Hai Chew v. *Colding*, 344 U.S. 590 (1953) 3

Lora v. *Shanahan*, 804 F.3d 601 (2d Cir. 2015) 14

TABLE OF AUTHORITIES—Continued

Page(s)

Mathews v. *Diaz*, 426 U.S. 67 (1976) 3

Olmos v. *Holder*, 780 F.3d 1313 (10th Cir. 2015) 14

Plyler v. *Doe*, 457 U.S. 202 (1982) 3

Schall v. *Martin*, 467 U.S. 253 (1984) 4

Solid Waste Agency v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) 16

Stack v. *Boyle*, 342 U.S. 1 (1951) 4

Sylvain v. *Attorney General of United States*, 714 F.3d 150 (3d Cir. 2013) 14

Troxel v. *Granville*, 530 U.S. 57 (2000) 8

United States ex rel. Attorney General v. *Delaware & Hudson Co.*, 213 U.S. 366 (1909) 15, 16

United States v. *Salerno*, 481 U.S. 739 (1987) 4

Wong Wing v. *United States*, 163 U.S. 228 (1896) 2, 3

Woodby v. *INS*, 385 U.S. 276 (1966) 9

Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 3

Zadvydas v. *Davis*, 533 U.S. 678 (2001) 3

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V 2

8 U.S.C. § 1226 ..... *passim*

8 U.S.C. § 1229b 9

TABLE OF AUTHORITIES—Continued

Page(s)

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EOIR, *Certain Criminal Charge Completion Statistics* (Aug. 2016), *available at* https://perma.cc/SD32-FGRB 6

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S. Rep. No. 104-48 (1995) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Scalia, Antonin & Garner, Bryan, *Reading Law: The Interpretation of Legal Texts* (2012) 15, 16

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who teach, research, and write about constitutional and immigration law, including the principles of due process and issues related to immigration detention. A complete list of amici's names, titles, and affiliations is set forth in the appendix to this brief.

Amici present this brief to provide analysis regarding the grave constitutional concerns raised by the government's interpretation of the statutory provision at issue in this case.

SUMMARY OF ARGUMENT

Interpreting 8 U.S.C. § 1226(c) to mean that all noncitizens who are charged as removable on account of certain criminal convictions must be detained without an individualized hearing—even those who have long been at liberty after having served their sentences—raises serious constitutional questions under the Due Process Clause of the Fifth Amendment. Freedom from arbitrary restraint forms the core of the liberty interest protected by the Constitution. Detention pending removal proceedings is permissible only to mitigate flight risk or public danger, and determining an individual's risk of flight or danger requires an individualized inquiry, not the irrebuttable presumptions and broad generalizations the government reads into § 1226(c). Although the Court has permitted brief immigration detentions without individualized hearings

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

immediately following criminal custody, that limited exception cannot apply to individuals who have long been at liberty following their release from criminal custody. There is little justification for an irrebuttable presumption of flight risk or danger in the case of noncitizens who are at liberty and likely to have deep ties to family, friends, work, and property in this country. Detaining such people without an individualized finding of flight risk or danger simply because they were in criminal custody at some time in the past is inconsistent with the Constitution's core protection of physical liberty. The government's interpretation should be avoided in favor of the interpretation, consistent with the statute's text, that mandatory detention only applies to noncitizens detained "when [they are] released" from criminal custody. This interpretation does not deprive the government of adequate control over the removal process, as the government may still detain long-released people who are determined through adequate procedures to pose a flight risk or a danger to the community.

ARGUMENT

I. Due Process Does Not Permit Mandatory Detention, Without Any Individualized Determination Of Risk Of Flight Or Danger, Of Noncitizens Who Have Long Since Been Released From Criminal Custody

A. Due Process Requires An Individualized Determination Of Flight Risk Or Danger Before Locking Up A Person Who Is Otherwise At Liberty

"No person shall be ... deprived of life, liberty, or property without due process of law." U.S. Const.

amend. V. A noncitizen is a "person." *See Wong Wing* v. *United States*, 163 U.S. 228, 238 (1896). This Court has held that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas* v. *Davis*, 533 U.S. 678, 693 (2001) (citing *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982)); *see also Mathews* v. *Diaz*, 426 U.S. 67, 77 (1976); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596-598 & n.5 (1953); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) (applying Fourteenth Amendment due process and equal protection provisions "to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality").

"Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Zadvydas*, 533 U.S. at 690; *see also, e.g.*, *Kansas* v. *Hendricks*, 521 U.S. 346, 356 (1997); *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992). Physical detention is among the most serious deprivations the government can impose on a person.

Where the government imposes civil detention or commitment, due process requires that "the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson* v. *Indiana*, 406 U.S. 715, 738 (1972); *cf. Zadvydas*, 533 U.S. at 690-691 (discussing the inadequacy of the government's justification for indefinite detention based on non-individualized determinations as to flight risk and dangerousness). Where, as here, detention is invoked as a means to protect the public or support the removal process, an individual's detention must in fact protect the public or assure her appearance at a removal hearing. *See Zadvydas*, 533 U.S. at 690-

691; *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 862 (2018) (Breyer, J., dissenting) (citing *United States* v. *Salerno*, 481 U.S. 739, 748-751 (1987); *Stack* v. *Boyle*, 342 U.S. 1, 4 (1951)).

The Court has been clear that due process contains both a substantive prohibition on arbitrary imprisonment as well as procedural protections to ensure that that substantive prohibition is observed. In upholding the constitutionality of detention without bond under the Bail Reform Act, and finding that the statute's use of a rebuttable presumption of dangerousness was not punitive, the Court noted that the act contained significant procedural protections, including an adversarial hearing before a neutral decisionmaker. *See Salerno*, 481 U.S. at 750; *see also Schall* v. *Martin*, 467 U.S. 253, 277 (1984) (requiring notice and a fair adversarial hearing to justify preventive detention of juveniles). Detention in *Salerno* was also temporally limited by the Speedy Trial Act. 481 U.S. at 747. Similarly, the Court allowed involuntary civil commitment for sex offenders only where procedural safeguards included a jury trial and proof beyond a reasonable doubt. *Hendricks*, 521 U.S. at 367-368. Further detention was allowed only subject to annual review of its continued need. *Id.* at 357. Also in the civil context, continued post-acquittal detention in a mental facility must be accompanied by "constitutionally adequate procedures to establish the grounds for ... confinement." *Foucha*, 504 U.S. at 79. These cases confirm that the Due Process Clause permits detention of a person who is otherwise at liberty only following individualized procedural guarantees that ensure that the detention is necessary to mitigate a risk of flight or danger.

Although the government relies heavily on *Demore* v. *Kim*, 538 U.S. 510 (2003), that case did not involve a

detainee who had long been at liberty. The respondent in *Demore* was detained when released from criminal custody, so the argument made by respondents in this case was not available to him, nor was it before the Court. *See Kim* v. *Schiltgen*, 1999 WL 33944060, at *1 (N.D. Cal. Aug. 11, 1999) ("His estimated release date was February 1, 1999.... The notice to appear was served on Kim on February 2, 1999, after he had completed his prison sentence, and Kim was accordingly taken into INS custody."), *aff'd sub nom. Kim* v. *Ziglar*, 276 F.3d 523 (9th Cir. 2002), *rev'd sub nom. Demore* v. *Kim*, 538 U.S. 510 (2003).

As explained in Section I.B below, it is improper to impose an irrebuttable presumption—as the government seeks to do here—that someone who has long been at liberty poses a risk of flight or danger merely because of a prior criminal conviction. Even if such a presumption were justified in the narrow circumstance presented in *Demore*, extending it to persons who have been physically unrestrained for often lengthy periods—and frequently have used that time to develop the very sort of community ties that make them unlikely to flee and more likely to receive relief from removal—would be arbitrary and punitive.

Further, *Demore* rested on the Court's view that detention without bond for noncitizens with certain criminal convictions and who are detained promptly when released was necessary only "for the brief period necessary for their removal proceedings," and that that period on average was very short, often well below 90 days. 538 U.S. at 513. That assumption was incorrect even when considering people detained upon completion of a criminal sentence: the government has now admitted error with respect to the statistics provided in *Demore*. *See* Letter from Acting Solicitor General

Ian H. Gershengorn to Hon. Scott S. Harris, Clerk, Supreme Court 1, *Demore*, No. 01-1491 (Aug. 26, 2016). At the time of *Demore*, the average length of detention in appealed cases was over a year, *see id.* at 3, more than double the assumption relied upon by the Court. According to the government's own recent statistics, between 2003 and 2015, more than 32,000 people were detained for over six months, more than 10,000 people for over a year, and more than 2,000 people for over two years. EOIR, *Certain Criminal Charge Completion Statistics* (Aug. 2016), *available at* https://perma.cc/SD32-FGRB. There are good reasons to suspect that even these numbers are low; EOIR does not count detention time until the government files a formal charging document or the time spent during any appeal to the federal courts or remand proceedings before the agency, which may take months or years. *See generally, e.g.*, ACLU, *Detained Without Process: The Excessive Use of Mandatory Detention Against Maryland's Immigrants* (2016), *available at* https://perma.cc/M6EG-PLYW. Those with significant defenses to removal or meritorious claims often have lengthy proceedings that lead to their being detained much longer than many who do not challenge removal. *Id.* at 9; *see also Jennings*, 138 S. Ct. at 869 (Breyer, J., dissenting). As the following section shows, these considerations are likely to prolong detention even further in the case of people who have been released from custody, as they are likely to have stronger cases for relief from removal that require development before the agency and courts of appeals.

B. The Government's Desire For An Irrebuttable Presumption Of Flight Risk Or Danger Is Improper Where The Individual Is At Liberty

The government argues that its interpretation of § 1226(c) reflects Congress's "categorical judgment" that noncitizens who have long since been released from criminal custody and have been living peaceably in the community nonetheless pose a risk of flight or danger. Pet. Br. 23. That bare assertion is unsupported and cannot justify the blanket imposition of an irrebuttable presumption of detention; if anything, it only reinforces the arbitrary and punitive nature of the government's proposed scheme.

Noncitizens who have lived freely for years following release from criminal custody are more likely to have developed significant community ties than are persons who are transferred immediately from criminal custody to immigration custody. Persons in respondents' position, who completed a sentence potentially long ago, have often found work, developed or revived a stable family life, pursued an education, supported U.S. citizen relatives, cared for aging parents, or otherwise led peaceful and productive lives. Respondents themselves detailed the ways in which their post-release liberty allowed them to develop and enhance these ties to the United States. *See, e.g.*, Decl. of Mony Preap ¶¶4-5, Dist. Ct. Dkt. 8-1 ("Preap Decl.") (following release from criminal custody and before immigration detention, Mr. Preap had sole custody of his U.S. citizen son, cared for his mother who is a breast cancer survivor, and worked part time); Decl. of Juan Lozano Magdaleno ¶6, Dist. Ct. Dkt. 8-3 ("Magdaleno Decl.") (following release from criminal custody and before immigration detention, Mr. Magdaleno provided financially for his wife and helped support his children and grandchildren, in-

cluding caring for four grandchildren before and after school each day). The Constitution recognizes the importance of these liberty interests. *See, e.g.*, *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000) (opinion of O'Connor, J.) (calling the liberty "interest of parents in the care, custody, and control of their children ... perhaps the oldest of the fundamental liberty interests recognized by this Court"); *Bridges* v. *Wixon*, 326 U.S. 135, 154 (1945) (noting the liberty interest in "the right to stay and live and work in this land of freedom").

The accumulation of personal, familial, professional, and property connections following release from criminal custody is important for two reasons. First, it significantly reduces the risk of flight and danger. Noncitizens who care for their families, hold title to homes, cars, or other property in their names, attend church or community events, and work steady jobs are unlikely to flee just because they are the subject of immigration proceedings. Individuals who have been at liberty are less likely to flee precisely because they would be fleeing their families, their livelihoods, and their property.[2] Community ties also make noncitizens less likely to be judged dangers to their communities, where they have been living peaceably otherwise. The government has offered no proof that jurisdictions where the decision below gave such individuals the opportunity to seek release on bond pending removal proceedings somehow experienced a higher level of flight or danger. By contrast, detention causes significant hardship for many

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[2] Of course, that does not mean that people who are detained immediately following release from criminal custody lack community ties; in fact, many have strong ties. For purposes of this case, however, what matters is that individuals who have been living freely for years often have had far greater opportunity to develop and maintain such ties.

noncitizens and their families. For example, one study of detention in Southern California found that 94% of those in detention are a significant source of financial or emotional support for their families. *See* Patler, UCLA Institute for Research on Labor and Employment, *The Economic Impacts of Long-Term Immigration Detention in Southern California* 3 (2015). Of those 94%, "nearly two-thirds (64%) ... reported that during their time in detention, their family was late paying rent, mortgage, or utility bills." *Id.*; *see also Barker* v. *Wingo*, 407 U.S. 514, 532-533 (1972) ("The time spent in jail awaiting trial ... often means loss of a job; it disrupts family life; and it enforces idleness. ... The time spent in jail is simply dead time.").

Second, the close connections that many noncitizens develop while at liberty are relevant in removal proceedings and decrease the chance that they will actually be removed. For example, community ties can strengthen a noncitizen's bid for discretionary relief, such as cancellation of removal. *See* 8 U.S.C. § 1229b(a)-(b). Section 1229b(b)(1)(D), for example, allows cancellation where "removal would result in exceptional and extremely unusual hardship" to a U.S. citizen relative. Lead respondent Mony Preap is such an example: his care for his mother, a refugee who fled torture by the Khmer Rouge and who developed a seizure disorder while in remission from cancer (Preap Decl. ¶¶2, 4), was part of the constellation of facts that led the government to cancel his removal. Pet. App. 6a-7a, 63a-64a. *Cf. Woodby* v. *INS*, 385 U.S. 276, 286 (1966) ("[M]any resident aliens have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens."). Further, noncitizens who are released after completing sentences for addiction-related

convictions can receive medical treatment and benefit from reentry programs that dramatically reduce the risk of reoffense and increase the chance of obtaining discretionary relief from removal. *See generally* Advancement Project Amicus Br. (discussing, in particular, the case of "Jennifer Frank").

The government's interpretation improperly assumes that noncitizens who, long after having been released from criminal custody, own homes, have families and friends, and are fixtures in their community would suddenly abandon their family and property once removal proceedings begin. The Constitution does not permit such an assumption when personal liberty is at stake. Rather, a neutral decisionmaker must determine that physical confinement is necessary to prevent flight or danger. The government's suggestion that a hearing would "reward[] a criminal alien" or be "a windfall upon dangerous criminals," Pet. Br. 28-29, 40, is baseless; an individualized hearing is designed precisely to assess whether the individual is in fact "dangerous" or a flight risk. If a neutral decisionmaker so concludes, then bond will be denied. But it is no "windfall" to allow someone to remain at liberty if she is found to be neither dangerous nor a flight risk and may be released on bond. On the contrary, it is the essence of due process that such a person *not* be detained, as her detention would be irrational or arbitrary. Indeed, a bond hearing for such a person is exactly what Congress contemplated when providing for bond hearings as the default in § 1226(a), subject to the narrow exception of § 1226(c).

C. Bond Hearings For Noncitizens Who Are Not Taken Into Immigration Custody Immediately Upon Release Do Not Compromise The Government's Ability To Enforce The Immigration Laws

The government claims (Pet. Br. 24) that the proper interpretation of § 1226(c) would undermine its ability to enforce the immigration laws. That argument again misconstrues the issue: the alternative to mandatory detention is not indiscriminate release, but rather individualized determinations regarding danger and flight risk. The statute already provides a bond process for noncitizens like respondents who do not fall under § 1226(c). 8 U.S.C. § 1226(a). The BIA's precedent places the burden of proof on the noncitizen to show she is not a flight risk or danger.[3] *See In re Guerra*, 24 I&N Dec. 37 (BIA 2006); *In re Adeniji*, 22 I&N Dec. 1102 (BIA 1999). Respondents adduced significant evidence of this sort—their relationships to U.S. citizen family members, their property interests, their work history, their church or community group involvement, and other ties they have developed in the time since their release from criminal custody. *See* Resp. Br. 7-9; *see also generally* Preap Decl.; Magdaleno Decl.

The government has presented no convincing argument that this procedure is burdensome or likely to result in mistaken releases of people who are flight risks or dangers to the public. The government reasserts statistics from a 1995 Senate Subcommittee Report cited in *Demore*, S. Rep. No. 104-48, at 1 (1995), but that report—now over two decades old—covered

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[3] Amici do not concede that the burden to show flight risk or dangerousness is properly on the individual, but merely note that the government currently proceeds as if it is.

noncitizens of all sorts, not just those who have been at liberty for a substantial period of time and are accordingly unlikely to flee. Nor is there any support for the government's *ipse dixit* that individualized determinations of flight risk or danger would "re-enabl[e] the very problems of flight and recidivism ... that Congress enacted Section 1226(c) to prevent." Pet. Br. 24. Again, where particular individuals in fact pose risks of "flight and recidivism," bond will and should be denied. The government offers no evidence suggesting that "flight and recidivism" have increased in the times and places in which § 1226(c) has been held not to apply to people like respondents.

The government's argument is also out of step with the government's own strategies to reduce flight risk for those noncitizens who are released on bond. The government currently employs numerous measures to ensure appearance at removal proceedings while protecting noncitizens' liberty interests. The government uses "a combination of home visits, office visits, alert response, court tracking, and/or technology" as part of what ICE calls Alternatives to Detention ("ATD"). Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Budget Overview, Fiscal Year 2019 Congressional Justification* 142 (2018), *available at* https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf. "Historically, ICE has seen strong alien cooperation with ATD requirements during the adjudication of immigration proceedings." *Id.* There is no reason why these same steps could not be used for noncitizens with criminal convictions who are determined not to be flight risks or dangers to the community through an individualized hearing. Indeed, ATD methods may be particularly suited for use with noncit-

izens who have stable and supportive connections to their community. For example, the government operates programs like the Intensive Supervision Appearance Program ("ISAP"), which uses case management principles and location monitoring to facilitate hearing attendance and compliance with orders. Virtually every participant in ISAP from 2011 to 2013 appeared at scheduled hearings. U.S. Gov't Accountability Office, Rep. No. GAO-15-26, *Alternatives to Detention* 30 (2014), *available at* https://perma.cc/U9KD-GVVT.

The government also employs risk management tools to assess flight risks and danger to the community. ICE has its own risk assessment tool called the Risk Classification Assessment ("RCA"). The RCA is a computer program that has a number of inputs: criminal and immigration history, family and personal data, local ties, family history, residency history, substance abuse, gang affiliations, and other individualized information gleaned from existing records and an intake interview. Koulish, *Using Risk to Assess the Legal Violence of Mandatory Detention*, 5 Laws 1, 7 (2016), *available at* https://perma.cc/BH9J-E4AW. "The algorithm then recommends detention or release, the amount of bail (if any), and detention or supervision levels." *Id.* A recent study of RCA scores found that "mandatory detainees are no more dangerous, or risky, than any other immigrant in immigration custody," including those who are eligible for bond or released outright. *Id.* at 15.

The government has accordingly shown no reason why its interests in enforcing the immigration laws in any way outweigh the interest of free persons in not being locked up again without an individual determination of flight risk or danger. That individual liberty interest, protected by the Due Process Clause, cannot be

overridden simply because the government prefers to detain people en masse.

II. If, As The Government Contends, The Statute Is Ambiguous, The Court Should Avoid The Government's Interpretation, Which Raises Serious Constitutional Questions

The government has consistently argued that the statutory language is ambiguous as to the meaning of "when ... released."[4] The BIA has also so ruled, *In re Rojas*, 23 I&N Dec. 117, 120 (BIA 2001), and many courts of appeals have as well.[5] That does not help the government, however; even assuming the statute is ambiguous, it should be construed to avoid the serious constitutional questions that the government's approach raises.

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[4] *See, e.g.*, Pet. 9 n.3 ("Paragraph (1) is also ambiguous with respect to whether 'when the alien is released' means 'at or around the same time,' or 'in the event that.'"); Pet. Br. 17 ("That clause standing alone could be read to mean either 'at or during the time that' ('while') the alien is released, or 'just after the moment that' he is released."); Defs.-Appellants' C.A. Reply Br. 4 ("Section 1226(c) is ambiguous."); *id.* at 2 ("[T]he word 'when' has multiple meanings."); *see also Sylvain* v. *Attorney Gen. of U.S.*, 714 F.3d 150, 156 nn.5, 6 (3d Cir. 2013) (noting that the government argued the language was ambiguous but declining to address the issue as unnecessary to its holding).

[5] *See, e.g.*, *Castaneda* v. *Souza*, 810 F.3d 15, 38 (1st Cir. 2015) (opinion of Barron, J.) (half of a divided *en banc* court finding that "when" connotes immediacy); *id.* at 49 (opinion of Kayatta, J.) (other half of the divided *en banc* court: "We also agree with our colleagues—and with the BIA—that the statutory language is not so plain as to foreclose all extra-textual inquiry."); *Lora* v. *Shanahan*, 804 F.3d 601, 611 (2d Cir. 2015) (holding the statute ambiguous), *vacated on other grounds*, 138 S. Ct. 1260 (2018); *Hosh* v. *Lucero*, 680 F.3d 375, 379 (4th Cir. 2012) (same); *Olmos* v. *Holder*, 780 F.3d 1313, 1318 (10th Cir. 2015) (same).

"[A] statute should be interpreted in a way that avoids placing its constitutionality in doubt." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012); *see also Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *United States ex rel. Att'y Gen.* v. *Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). As the Court recently stated, "when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings*, 138 S. Ct. at 836.

The Court considered but rejected use of the canon when interpreting other language from § 1226. *See Jennings*, 138 S. Ct. at 842. There, however, the Court held that the statute was not ambiguous. *Id.* The Court held that the language did not permit two interpretations of the appropriate detention period, because no artificial time limit could be derived from § 1226(c)'s inclusion of a "'definite termination point.'" *Id.* at 846.

Here, if the statute is ambiguous, as the government has contended and the BIA has held, the statute must be interpreted and the canon of constitutional avoidance applied in the process. Section 1226(c)—specifically the words "when the alien is released"—can easily be read in a way that avoids the constitutional difficulty, namely by limiting mandatory detention to noncitizens who are placed in immigration detention immediately following the time at which they are released from criminal custody. Use of the canon is

therefore appropriate to choose respondents' interpretation—that § 1226(c)'s mandatory detention scheme does not apply to noncitizens who have been at liberty after their release from criminal custody.

Proper use of the canon does not require a decision on the merits of the constitutional question, but "merely a determination of serious constitutional *doubt*." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 250 (1998) (Scalia, J., dissenting). There is no requirement that the Court be convinced that a contested interpretation is actually unconstitutional (although in this case, the government's interpretation clearly is). To the contrary, only serious doubts are required. Indeed, the canon would lose some of its utility if the Court were required to decide the constitutional issue. *See, e.g.*, *Delaware & Hudson Co.*, 213 U.S. at 408 (rejecting the view that constitutional avoidance requires courts "to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution"); *see also Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) ("[O]ne of the canon's chief justifications is that it allows courts to *avoid* the decision of constitutional questions.").

The Court should assume that Congress legislates within the bounds of the Constitution. "[T]he canon rests ... upon a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature." Scalia & Garner, *supra*, at 249. The canon is related to a clear statement rule—if Congress wishes to approach the outer bounds of constitutionality, then it must do so explicitly and clearly. *See, e.g.*, *Solid Waste Agency* v. *United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (rejecting a statutory interpretation that would

raise constitutional questions because there was no "clear statement from Congress"); *INS* v. *St. Cyr*, 533 U.S. 289, 299 (2001) ("[W]hen a particular interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.").

The government argues that respondents' interpretation raises "serious practical problems" related to "gaps in custody ... caused by reasons outside the federal government's control." Pet. Br. 25-26. But the statute must be interpreted the same way for individuals who have been at liberty for 30 years as those who have been at liberty for 30 days. *See Clark*, 543 U.S. at 380 (the Court "cannot justify giving the *same* detention provision a different meaning when such aliens are involved. ... The lowest common denominator, as it were, must govern."). As shown in Part I above, the government's interpretation raises clear constitutional questions by allowing detention without an individualized hearing as to flight risk and danger of individuals who have long been at liberty. While there may be complicated line-drawing questions at the margins that can be litigated in other cases, it suffices to affirm the judgment below to hold that the government has failed to show that the statute clearly calls for the unconstitutional result of locking up someone who has long since been released from criminal custody, without any individual determination that confinement is needed to serve any valid governmental purpose. The government may and should continue to detain people who pose actual risks of flight or danger. But it cannot demand the right to deprive vast numbers of individuals of their physical liberty simply because they were in criminal custody at some point in the past and are now in removal proceedings. Without any individual need to

detain such persons, the detention is arbitrary, punitive, and unconstitutional.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MARK C. FLEMING
Counsel of Record
ANNALEIGH E. CURTIS, PH.D.
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000
mark.fleming@wilmerhale.com

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APPENDIX

APPENDIX

AMICI CURIAE CONSTITUTIONAL AND IMMIGRATION LAW PROFESSORS

This Appendix provides amici's titles and institutional affiliations for identification purposes only. The listing of these affiliations does not imply any endorsement of the view expressed herein by amici's institutions.

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
Berkeley School of Law

Kari E. Hong
Assistant Professor
Boston College Law School

Stephen Lee
Associate Dean for Faculty Research and Development and Professor
University of California, Irvine School of Law

Stephen Legomsky
John S. Lehmann University Professor Emeritus
Washington University School of Law

Leah Litman
Assistant Professor of Law
University of California, Irvine School of Law

Hiroshi Motomura
Susan Westerberg Prager Distinguished Professor of Law
University of California, Los Angeles School of Law

Gerald L. Neuman
J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law

Harvard Law School

Kermit Roosevelt
Professor of Law
University of Pennsylvania Law School

Stephen Yale-Loehr
Professor of Immigration Law Practice
Cornell Law School